Appendix 9

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VIA EMAIL AND U.S. MAIL

Matthew Sailor, Regulatory Project Manager
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U.S. Army Corps of Engineers
Kansas City Regulatory Office
601 East 12th Street, Room 402
Kansas City, MO 64106

Re: Response to May 8, 2015 Correspondence on Comments During Public Comment Period

Gentlemen:

This letter is in response to your May 8, 2015 request for additional input regarding public comments received by USACE on the applications submitted by Capital Sand Company, Inc.; Hermann Sand and Gravel, Inc.; Holliday Sand and Gravel Company; Con-Agg of Missouri, LLC; Limited Leasing Company; and J.T.R .Inc. ("Dredgers") for applications received March 1, 2015.

In response to your letter, we have caused to be prepared and you have received on August 3, 2015, a biological report for your use regarding the pallid sturgeon. This comprehensive review, in the opinion of the applicants, concludes that there is no discernable difference in the effects previously noted in the 2011 EIS and Biological Assessment. For the remainder of this letter, I will respond to the sections as presented in your May 8, 2015 letter.

1. Kansas City District ("KCD") performing an analysis of dredging. The applicants support the KCD performing an analysis of dredging volumes and locations, review of bed surveys and water surface profiles from 2011-2014, and comparing to baseline data included in the previous EIS. This is consistent with the analysis and Record of Decision promoting an adaptive management style strategy with regard to extraction limitations based upon the various segments and reaches (see 2011 ROD pages 4-27 to 4-28). Preliminary data shared with the Dredgers indicates, consistent with our position, that the effect of commercial sand dredging is nominal with regard to the bed and that adjustments can be made where bed stress may be present.

2. Cumulative extraction totals exceed the highest alternatives – Waverly Segment. Applicants Holliday Sand and Gravel Company and Capital Sand Company, Inc. recognize that their requests with regard to the Waverly Segment exceed the highest alternative evaluated under the 2011 Final Environmental Impact Assessment ("EIS") and Record of Decision ("ROD"). Consistent with the adaptive management philosophy presented in the ROD (see pages 2-14, 4-15, and 4-27 to 4-28) and the recognition that the survey provided in the previous five-year permit cycle (and other collective surveys) will provide new information regarding Waverly Segment load, the requests reflect the Dredgers knowledge of the data and surveys that are presented and appropriately represent requests consistent with an adaptive management style strategy.

3. Updating of the Biological Assessment ("BA"). The Dredgers have provided and previously delivered a biological report as requested to support KCD's effort to evaluate and update their previous BA. The report was delivered to the Corps on August 3, 2015.

Additional substantive comments requiring application discussion.

1) The U.S. Environmental Protection Agency (EPA) indicated that the requested extraction totals in the Waverly, Jefferson City, and St. Charles river segments exceed the original authorized extraction totals permitted in 2011. The EPA also emphasized the requested extraction totals in the Waverly Segment exceeded the highest evaluated alternative in the 2011 Final EIS for Missouri River Commercial Dredging and the ROD. Thus, the EPA does not believe there is justification for the requested tonnage increases above those authorized in the 2011 ROD.

Response of applicants: EPA's recognition that requested extraction totals in Waverly, Jefferson City, and St. Charles river segments exceed the original authorized extracted totals permitted in 2011 is accurate. EPA's emphasis that the requested extraction totals in the Waverly Segment exceed the highest evaluated alternative in the 2011 Final EIS for Missouri River Commercial Dredging and the ROD is accurate. However, EPA's statement that they do not believe there is justification for the requested tonnage is not accurate. In fact, EPA completely ignores in its entire position letter the intention of the previous EIS, ROD, and the previous permits was to evaluate conditions of the bed based upon the latest data recognizing the changes presented in the previous permit cycle to ameliorate concentrated dredging operations. Those actions to ameliorate concentrated dredging operations were followed consistent with the permit and there is no dispute that has occurred.

The 2011 ROD and the permits that were issued thereto fully contemplate an adaptive management style philosophy to examine, at the end of a five-year permit cycle, the nature and character of the bed (see Section 4.2.3.1.3 Monitoring and Adaptive

Management Framework, 2011 ROD). The data confirms, as suspected, that the Waverly Segment continues to accumulate additional material. Consistent with the intent of the 2011 EIS, ROD, and permits, the Dredgers have adjusted their requests to align with the accretion of material. The 2014 survey, a required permit condition, demonstrates those areas necessary for adjustment and the applications are consistent with that information. This information should be incorporated in KCD's analysis of the bed relating to this permit cycle.

2) The EPA believes the 404(b)(1) Guidelines have not been met and there are other less environmentally damaging practicable alternatives available because sand and gravel mining are not water dependent.

Response of applicants: There has been no change with respect to any factors regarding the 404 (b)(1) analysis conducted in the 2011 review which determined that the current operational characteristics met the requirements of the least environmentally damaging practical alternative.

3) The EPA also has concerns that commercial dredging on the Missouri River is causing significant degradation of our Nation's waters by adversely affecting human health and welfare, aquatic life and other wildlife, aquatic ecosystem diversity, productivity and stability, and/or recreation, aesthetic and economic values.

Response of applicants: EPA provides no substantiation for any claims of adverse effect to human health and welfare, aquatic life and other wildlife, aquatic ecosystem diversity, productivity and stability, and/or recreation, aesthetic and economic values created by commercial sand dredging. In fact, EPA provides no differentiation of any of these effects from (a) the development of the Bank Stabilization and Navigation Project ("BSNP") consistent with congressional authorization; (b) permits granted by EPA for the discharge of human waste and other biological materials into the waters of the Missouri River; (c) containment of sands and sediments behind the six main stem reservoirs as authorized by Congress in the 1944 Flood Control Act; (d) agriculture; and (e) normal runoff (to name a few pertinent actions).

To the contrary, commercial sand dredging and commercial navigation (a) reduce air emissions, including those that contribute to the effects of global warming and climate change; and (b) create economic value, in particular, to the states of Missouri and Kansas.

EPA would have one believe that commercial sand dredging constitutes a change in the river system. To the contrary, no commercial sand dredging is permitted outside of the designated main channel of the Missouri River, which has already been altered, changed, and modified consistent with congressional authorization. There is absolutely no demonstration of commercial sand dredging causing "significant degradation" or any

adverse effects. These statements are pure sensationalism and speculation. This is confirmed by the 2011 EIA and 2011 ROD.

For example, recreation within the boundaries of the BSNP *during commercial sand dredging has increased every year during the five-year permit cycle that has been previously advanced*. In addition, both the State of Missouri's 401 certifications provided with the 2011 404 permit certified that there is no impact to water quality of significance. Apparently, the state's environmental agencies do not concur with EPA's assertion.

4) The U.S. Fish and Wildlife Service (Service) believes significant new information regarding population status, larval ecology, and habitat conditions of the endangered pallid sturgeon have surfaced since the issuance of the 2011 dredging permits. Considering new and historic information, the effects of dredging should be analyzed for all life states and habitats of the pallid sturgeon; therefore the Corps should update and/or revise the 2011 Biological Assessment.

Response of applicants: The Dredgers participate in the Missouri River Recovery Plan and are represented on the Missouri River Recovery Implementation Committee. We are acutely aware of activities relating to the endangered pallid sturgeon. We concur with the Fish & Wildlife Service that significant new information has been garnered during the previous five-year permit cycle. Consistent with that position and that knowledge, we have provided support to KCD to update the 2011 biological assessment. That report was made available to KCD on August 3, 2015.

5) The Missouri Department of Transportation requests that dredging not be allowed with 1,000 feet of any bridge pier or abutment to eliminate the potential for scouring and protect the structural integrity of state's infrastructure.

Response of applicants: We do not concur with MoDOT's position that an increase is necessary with regard to the protection standard already included in our permits for any bridge pier or abutment. We request KCD orchestrate a meeting between MoDOT and Dredger representatives to detail their concerns and exact locations of those concerns rather than a blanket change in position inside the permit.

6) WaterOne believes that the Missouri River commercial dredging permits should not be renewed until the conclusion of the Missouri River Bed Degradation Feasibility Study. The company believes that dredging is a significant contributor to river degradation and hence, a treat to public and private infrastructure.

Response of applicants:

WaterOne's jurisdiction and provision of service relates strictly to the Kansas side of the Kansas City metropolitan area. Their intake of concern is located at mile marker

379. Yet, they request that commercial sand dredging permits throughout the Missouri River system be denied, asserting that "commercial sand dredging is a significant contributor to . . . degradation." We do not concur with their request or assertions regarding alleged impacts from commercial sand dredging operations.

The Dredgers collectively believe that any significant impacts on the bed are the result of design considerations and operational deficiencies relating to USACE design, operation, and maintenance. We have held that position since the inception of the review process of 2011 permits, appealed that position, and maintain our position collectively as a group. Consistent with the analysis provided, this review is only limited to commercial sand dredging, does not take into account the entire system dynamics, the needs for engineering upgrades, the needs for significant changes with regarding to training structures, and reduction in sediment loads over 70% throughout the system as confirmed by the National Academies of Science. WaterOne's statements are blatantly inaccurate. As a direct example, conditions in the Waverly Segment are accreting. Conditions in the Jefferson City Segment are stable and accreting. Conditions in the St. Louis Segment are stable and accreting.

The BSNP engineering and maintenance plan required adjustments to engineering, training structures, and other conditions on an adaptive basis. The documents *clearly* demonstrate that ongoing engineering design changes and structural adjustments were anticipate in the operation of the BSNP. These have been rarely conducted and rarely made. USACE has demonstrated that where changes have been made to both engineering and structures, bed degradation is ameliorated and commercial sand dredging comptabile albeit with adjusted rates.

It is the position of the applicants and was presented in our appeals of our permits that without design changes and without adjustments the Missouri River will continue to cut with or without commercial sand dredging and in certain areas continue to degrade with or without commercial sand dredging throughout the river. The applicant Dredgers support the philosophy included in the 2011 permit cycle of responsive permit that makes adjustments based upon available load and adjustments to the system. The applicants requests are consistent with that strategy.

The applications as submitted were accommodations to the data presented including concerns of WaterOne regarding extraction of material in the Kansas City Segment. Requests in the Kansas City Segment are consistent with the 2011 EIS and KCD's previous determinations of minimal demand. WaterOne's request for complete denial of applications is unfounded.

The overwhelming majority of commenters during the public comment period support the reissuance of permits in the applications of the commercial sand dredgers.

The requests of both KCD and the Fish & Wildlife Service have been met. That information confirms that there is no difference between the current position with the additional information as provided and the previous ROD and 2011 Biological Assessment. We concur that evaluations by KCD must occur to determine if the adaptive requests for shifts in tonnage justify changes in the Waverly Segment. We believe they do. In addition, we believe small adjustments in the Jefferson City and St. Louis Segments are insignificant and appropriate.

We appreciate USACE's efforts to continue to review these permits in a timely manner so that there is no permit gap. In the event that USACE KCD believes that additional time will be necessary beyond December 31, 2015, to complete its review based on factors outside of our control, we formally request consideration of an extension to address those timeframes that may exceed December 31, 2015.

Should you require further information in general, please contact me directly. The individual applicants are available to specifically discuss their applications. Please contact me to set up those meetings should they be necessary.

On behalf of Capital Sand Company, Inc.; Hermann Sand and Gravel, Inc.; Holliday Sand and Gravel Company; Con-Agg of Missouri, LLC; Limited Leasing Company; and J.T.R .Inc., I remain

Very truly yours,

LATHROP & GAGE LLP

By:
David A. Shorr

DAS/jf

cc: Jason Branstetter, Capital Sand Company, Inc.
Steve Engemann, Hermann Sand and Gravel, Inc.
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